

WATERGATE AND THE CONSTITUTION

By Philip B. Kurland*

Chicago: The University of Chicago Press, 1978. Pp. x, 261. \$12.50.

Professor Kurland's first sentence asserts that *Watergate and the Constitution*¹ is "neither a text nor a treatise on either Watergate or the Constitution. It is rather a series of essays meant for nonlawyers on the theme perhaps best described as the constitution and reconstitution of the Constitution."² This disclaimer highlights both the strength and the weakness of this series of ten essays on why the office of the Presidency developed imperial trappings, how it grew corrupt under the reign of Richard Nixon, and what may be done to control it. When Kurland sticks to his premise—describing the process of growth and reformation of the Constitution—his book is thought provoking. When he strays into the cesspools that surround the Watergate affair, he is much less successful.

Unfortunately, Kurland's promise often exceeds the delivery. There are some introductory thoughts on extremely fascinating and immensely important issues—for example, the process of judicial amendment of the Constitution.³ But he barely outlines the scope of these problems before moving on to other topics. Many of these other topics, however, are essentially dead issues legally, issues that have been resolved for decades for the best of reasons—that historical, political, and legal arguments in favor of their resolution are unchallenged. For this reviewer at least, the end result is a sense more of what might have been and some sorrow that Professor Kurland has not chosen to devote his talents to a thorough discussion of the serious problems with which he deals.

Kurland's introductory chapter⁴ outlines the central evil exposed by Watergate—the accumulation of power within the Presidency:

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1. P. KURLAND, *WATERGATE AND THE CONSTITUTION* (1978).

2. *Id.* at ix.

3. *Id.* at 10-16.

4. *Id.* at 1-16. Chapter eight, entitled "Separation of Powers and Checks and Balances," discusses essentially the same issues in greater detail. *Id.* at 153-79.

The constitutional crisis of Watergate was the result of a long buildup of concentrated governmental power. It was the result of the failure to adhere to the limitations on authority that are explicit and implicit in the Constitution. It was the result of long denial of institutional values in favor of temporary political expediency. The tragedy of Watergate lies not in the pitiful character of the man exiled from the White House; it lies rather in the continued failure of the nation to take steps first to cabin and then to dissipate that accumulated power, the failure to revive our constitutional notions of limitations on authority.⁵

The author is quite properly concerned with the accumulation of presidential power. The basis of this concern is not merely the old cliché about the corrupting effects of power. It is the more subtle but more accurate observation that we have no guarantee of wise and honest public servants always capable of handling power.⁶ The power safely entrusted to a Jefferson or a Lincoln is sadly abused when, all too often, the public chooses a Harding or a Nixon. Moreover, even the wisest and the most capable leaders may not always perceive the adverse consequences of their use of power; they seek to gain ends regarded as essential and are blind to the costs of their choice of means. Roosevelt's court-packing plan is an excellent illustration.

As Kurland notes, the founding fathers originally attempted to avoid accumulation of excess power by drafting a written constitution that would define forever what each branch of the federal government, and the government itself, might do. Power was divided among three branches in the belief that the natural jealousy of each branch of its own powers would prevent accumulation of excess power in the other two branches. Power was further subdivided between the federal government and the states and still further subdivided among the various states, each sovereign in its own realm.⁷

In the twentieth century this grand constitutional design has become a myth. Kurland accurately identifies the critical factors in this

5. *Id.* at 5.

6. The contrast in political rhetoric between 1960 and 1976, an extremely short period in the life of the Nation, is illuminating. In 1960 President Eisenhower was said to have failed to exercise leadership in the White House as the country stagnated under the leadership of a resurgent Congress. By contrast, President Kennedy was the man to get the country moving again, the man who would pay any price and bear any burden in pursuit of worldwide freedom. The recipe was greatly increased presidential power. Yet by 1973, a chief White House assistant to President Kennedy and a distinguished historian, Arthur M. Schlesinger, Jr., would write in doleful tones of the imperial Presidency and its attendant opportunities for abuse. See A. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973).

7. P. KURLAND, *supra* note 1, at 3-4.

change—the economic crisis of the 1930's, which led to a massive shift of economic and social power from the states to the federal government; the emergence of the United States as a world power, which vastly increased presidential power at the expense of Congress; the geometric growth of the bureaucracy, resistant to all forms of political control; the growing importance of the judiciary.⁸ To accommodate these upheavals, the Supreme Court developed a practice of informal amendment of the Constitution by reinterpreting old language and discarding ancient traditions. Kurland saves his severest remarks for this process of judicial review that creates informal amendment. He believes that, more often than not, the Constitution means little more than what a majority of the Supreme Court says is correct at any one time. It is equally clear that Kurland mistrusts the legislative and policymaking abilities of these nine men.⁹

If Kurland accurately diagnoses the source of uncontrolled presidential power, he is less than specific in prescribing a cure. Presidential power is a fact of life in twentieth century America. Congress is institutionally incapable of providing effective leadership. In part this is due to the nature of the federalist system. Congressmen and senators elected from individual states and districts owe their first loyalty to the people who elected them. On most public policy issues, and certainly those affecting the pocketbook, it is unrealistic to expect these leaders to consider the national interest ahead of their purely regional or sectional interest. A senator or congressman whose district is heavily dependent upon federal military procurement will not take a long-range, national view of the merits of, for instance, the B-1 bomber. The national interest might require an affirmative vote on the Panama Canal treaty. But a senator from Texas, who fears a loss of twenty-five percent of his constituents if he supports the treaty, will not run the risk. The decline of the political parties and the rise of single-issue voters and special interest groups exacerbates the problem. The institutional deficiencies demand a single national leader, inevitably the President.

The nation's role in world affairs also requires that the President exercise far greater power than the framers of the Constitution foresaw. An appropriate response in foreign policy requires an immediate, unified response, again an executive branch specialty.

Finally, and perhaps most subtly, the public has come to regard the

8. *Id.* at 172-77.

9. *Id.* at 15-16.

President as the public official most immediately responsible for their economic and social welfare. If the President bears the responsibility, he will inevitably seek the power to fulfill it; and the theory that the power must lie where the responsibility lies will make his search easier.¹⁰

I think Professor Kurland would agree with my point that presidential power is historically and politically inevitable. The challenge is not to reduce it, but to devise means to make it accountable; to ensure that the President acts only with a full awareness of the consequences of his actions; to expose the lesser lights who inhabit the White House for what they are.

The second chapter focuses on one way of making presidential power accountable—the congressional power of inquiry. Kurland observes that the constitutional basis for congressional inquiries, whether explicit or implicit, is extremely weak.¹¹ The founding fathers granted to Congress certain powers of investigation, but limited them primarily to the impeachment function. There was, perhaps, some interest in investigation to obtain factual material upon which to legislate. From a separation of powers perspective, the primary value of congressional investigation is its oversight of the executive branch—investigations to determine how well the executive implements congressional wishes, when the executive is corrupt, or when it is merely weak or lazy.

The author correctly notes that these latter functions developed more through custom and long-range usage than through any kind of constitutional sanction. “As with much of our constitutional history, Congress performed its duties as it conceived them to be until the courts were brought in to tell it what it could do and could not do.”¹² Despite some early limitations, the Supreme Court has essentially given Congress a free rein in congressional investigation. The Court has, to be sure, imposed strict due process limitations upon the kinds of questions a witness must answer and the precision with which Congress must define and authorize the goals of the investigating committee. But these rules restrict primarily the means by which Congress conducts its investigations, rather than the power of investigation. Moreover, these limits primarily protect the constitutional rights of individual witnesses and

10. *Cf.* *New York Times Co. v. United States*, 403 U.S. 713, 728-30 (1971) (Stewart, J., concurring) (responsibility for classifying secret documents must lie with the executive, given his large degree of unshared power in the conduct of foreign affairs).

11. P. KURLAND, *supra* note 1, at 18-21.

12. *Id.* at 23.

ensure that the committee remains accountable to the whole Congress. They do not affect the concept of congressional oversight of the executive branch.

As Kurland properly notes, legislative oversight of the executive is an integral way to assure that presidential power is accountable.¹³ And this process, while perhaps not specifically contemplated by the founding fathers, is entirely consistent with their overall views of the relationships among the branches. The natural tendency of each branch to seek to aggrandize its own power by examining and exposing executive mistakes, even for base political motives, serves as a powerful check on the Presidency itself. Despite the Constitution's silence on congressional inquiry, the founding fathers surely would not object to a device consistent with their overall views of separation of powers. Congressional oversight of the President is an entirely legitimate use of congressional power.

The problem, as the author reminds us, is that the method to legitimize an obviously proper tool such as congressional investigation is badly wanting.¹⁴ The Supreme Court relied on two devices of doubtful legitimacy in approving congressional investigations. The first was legal fiction: a device "by which the Court indulges a presumption that something is true that it knows is not necessarily true."¹⁵ The legal fiction attributed to congressional investigation was the Court's sophomoric assumption that all such investigations are aimed at acquiring information on which to base legislation. Hence, any investigation that might conceivably have been motivated by the prospect of additional legislation is justifiable. Safe within the cocoon of its legal fiction, the Court can conveniently ignore the rational man's disbelief that Congress was in fact motivated by a special legislative goal. The second device is "law office history."¹⁶ This entails a selective interpretation of events and prior statements—often out of context—to justify whatever result the Court wishes. The sophomoric quality of this historical scholarship can be conveniently ignored.

Professor Kurland is surely right to chastize the Court for resorting to these devices for legitimizing custom. Yet, there must be some device by which the Court can properly recognize a necessary custom that fills a gap in the explicit language of the Constitution. Unfortunately,

13. *Id.* at 28.

14. *Id.* at 17.

15. *Id.* at 26.

16. *Id.*

Kurland offers no defensible alternative. I would submit that the proper device is a functional analysis of the constitutional structure and the place of the custom within that structure. If, like the congressional power of inquiry, the custom is consistent with the purposes and expectations of the founding fathers, that in itself should establish the constitutional validity of a longstanding custom.

If the power of legislative inquiry is Congress' chief sword in its battle for political power with the executive, the executive's primary shield is the ill-defined notion of executive privilege. Chapter three begins with variations on a theme by Raoul Berger¹⁷ dealing with the "myth" of executive privilege. Kurland accurately observes that, Professor Berger's protestations to the contrary notwithstanding, the Supreme Court has indeed sustained the principle of a constitutional executive privilege for internal discussions between a President and his advisors.¹⁸ But the decision in *United States v. Nixon*¹⁹ did not resolve many of the critical questions about the ongoing relationship between the President and Congress. As Kurland notes, *United States v. Nixon* dealt with the relationships between the President and the judiciary in the context of a criminal prosecution.²⁰ Despite substantial overbreadth in the Court's opinion, the rule emerging from *United States v. Nixon* is almost surely that the President alone may determine when the executive privilege for internal discussions applies, except in cases where the President himself is a target of the criminal proceeding.²¹ Again, despite some overreaching dicta, the Court did not discuss the relationships between the President and Congress or between the executive branch and Congress.

Here, the author once again fails to follow up on a thesis that offers fascinating possibilities. Quite correctly, he notes the myth that the President controls the relationships between the executive branch and Congress. In fact, much of the executive bureaucracy is beyond the control of even the most skilled White House administrator. It seems clear that a constitutionally-based executive privilege for internal discussions is appropriately claimed only by the President, a reform the Nixon administration first implemented. Without presidential sanc-

17. *Id.* at 34 (citing R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH (1974)).

18. *Id.*

19. 418 U.S. 683 (1974).

20. P. KURLAND, *supra* note 1, at 34-35.

21. See Note, *Executive Privilege and the Freedom of Information Act: The Constitutional Foundation of the Amended National Security Exemption*, 1976 WASH. U.L.Q. 609, 634.

tion, the executive bureaucracy could not assert the privilege. The subject of control of the bureaucracy, however, is only marginally related to the concept of executive privilege; in general, Congress should be entitled to such executive information as it wishes as part of its oversight duties.

The bulk of the chapter discusses the various reasons for a constitutionally-based internal discussions privilege from congressional inquiry and gives a blow-by-blow account of some of the tussles between Nixon administration stalwarts and Congress during the Watergate crisis. In so doing, Kurland fails to distinguish between the internal discussions privilege and a privilege for state secrets; nor does he distinguish between the usual claim to executive privilege and a claim when the President is subject to impeachment. Both omissions are unfortunate. As I have argued elsewhere,²² a constitutionally-based executive privilege for state secrets is indeed a myth because Congress shares the responsibility for the conduct of foreign affairs.²³ The privilege is a state privilege and not the exclusive property of the executive branch. As between the President and Congress, I think it clear that there is no constitutionally valid executive privilege based exclusively on state secrets.

The internal discussions privilege presents more complicated issues, because that privilege, unlike state secrets, is the personal prerogative of the Executive. It exists solely to protect executive decisionmaking and consequently is inherently executive in a way that state secrets are not. My own view is that there should be a constitutionally-based executive privilege for withholding information from Congress when the subject of investigation is other than the election, impeachment, or misconduct of the President.

If the privilege for internal discussions is necessarily executive, only the President can properly determine what dangers attend disclosure to Congress or the public. Concededly, there will be occasions when the President makes use of the privilege for base motives, such as personal political gain. There is obviously a potential conflict of interest when the President is both the arbiter of the privilege and its ultimate beneficiary. But two additional factors reduce the danger. First, as Kurland notes, quite often the real combatants are not the President and Congress but the executive bureaucracy and one or another of its supposed

22. See notes 19-21 *supra* and accompanying text.

23. See Note, *supra* note 21, at 657.

masters.²⁴ Second, Congress retains informal political power to extract information essential to congressional duties. Although courts have been less than enthusiastic in enforcing congressional subpoenas to the executive branch,²⁵ Congress has other tools. It can withhold funds, delay confirmation of nominations, or bottle up in committee bills that the administration strongly supports. All of these standard political methods for pressuring the President reduce substantially the possibilities for abuse of executive privilege, for the President must always be cognizant of the political costs of using it.

The situation is different with respect to presidential impeachment or other investigations of misconduct. Here, the conflict of interest inherent in the President as both arbiter and beneficiary of the privilege reaches its maximum. A President in serious danger of impeachment will obviously have as his paramount goal retention of his office and will be more insulated from the normal political controls of the legislature. Simultaneously, his credibility as impartial judge of the propriety of the privilege will be seriously undermined. When presidential impeachment is at issue, therefore, Congress deserves to have its subpoenas for confidential presidential communications fully honored by the courts, and the District of Columbia Circuit was plainly wrong in holding to the contrary.²⁶

Chapter five deals with the role of the courts in the Watergate affair. Kurland properly reserves some of his strongest denunciations of the judiciary for this chapter. A favorite phrase of the blackjack tables, "the bank wins, and the players lose," accurately describes the results of power clashes between the executive, the judiciary, and Congress. The courts won, and the Congress lost.²⁷ Considering that the courts were the ultimate arbiters of their own powers, this result is perhaps not unduly surprising.

The author first discusses the unavailing efforts of the Senate Select Committee on Presidential Campaign Activities to secure judicial enforcement of its subpoenas to the President. In *Senate Select Committee*

24. P. KURLAND, *supra* note 1, at 35.

25. See Senate Select Comm. on Presidential Campaign Activities v. Nixon, 370 F. Supp. 521 (D.D.C.), *aff'd*, 498 F.2d 725 (D.C. Cir. 1974); Senate Select Comm. on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51 (D.D.C. 1973).

26. Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir.), *aff'g* 370 F. Supp. 521 (D.D.C. 1974).

27. P. KURLAND, *supra* note 1, at 53.

on *Presidential Campaign Activities v. Nixon*,²⁸ Judge Sirica held that the court lacked jurisdiction because the \$10,000 jurisdictional amount had not been satisfied. This is perhaps an understandable exercise of judicial self-restraint by a court seeking to avoid involvement in constitutional crises.

The courts were unable to dodge the issue when the committee acted pursuant to an explicit statutory authorization of federal jurisdiction. The district court refused to enforce a subpoena²⁹ on the ground that the committee had not demonstrated the "pressing need" required by *Nixon v. Sirica*.³⁰ For perhaps the first time since the 1930's, a federal court adopted a restrictive view of Congress' needs in acquiring information for legislation. But Judge Sirica also noted the complete absence of presidential interest in secrecy and ultimately resolved the issue against the committee because of adverse pretrial publicity for the other Watergate defendants.³¹

The D.C. Circuit affirmed³² the decision, but was sharply critical of Judge Sirica's approach. The court apparently held that the judiciary acquires the power to invade an explicit claim of presidential privilege only when the body seeking the evidence demonstrates a compelling need. Given the claim of executive privilege, the information sought was not sufficiently critical to the legislative function to permit the court to override it. Moreover, any concern about impeachment, the court said, was satisfactorily resolved by delivery of the requested material to the House Judiciary Committee, which was then considering impeachment.³³

Kurland is properly sarcastic about these results:

It will readily be seen that the court here was relying on the existence of executive privilege as the barrier to access by the Select Committee. It was a balancing of the privilege against the need of the Select Committee that was indulged by the court. . . . The executive and the legislative branches were to be confined in their operations to the degree that the judicial branch determined, not what was constitutionally prescribed, but what was the better public policy. Who better equipped with the bases for judgment as to public policy than the federal judiciary, whose black robes, like those of Merlin, confer access to wisdom, truth, and justice

28. 366 F. Supp. 51 (D.D.C. 1973).

29. *Id.* at 57.

30. 487 F.2d 700 (D.C. Cir. 1973).

31. 370 F. Supp. 521, 522-23 (D.D.C. 1974).

32. 498 F.2d 725 (D.C. Cir. 1974).

33. *Id.* at 732.

unavailable to ordinary mortals.³⁴

Concededly, both district and circuit court wrote opinions open to criticism. But Professor Kurland does not take the extra step to explain how the judiciary might better have arrived at a principled, constitutional resolution of the issue. Again, I would suggest that a functional approach is appropriate and that the court should have looked more closely at the congressional interest in acquiring the information and the President's interest in keeping it secret. Despite the rule that impeachments must originate in the House, it is evident that the Senate Committee's needs were closely related both to the impeachment process and, as its title suggests, the process by which the President is elected. Both of these interests go directly to the heart of presidential power. It follows that the President's interest in retaining his secrets in these areas was fraught with a conflict of interest. Normal restraints upon presidential defiance of Congress were conspicuously absent. In these circumstances, a functional analysis of the interactions of the three branches strongly suggests that the judiciary is better suited to determine the propriety of the exercise of privilege than is the President. Moreover, the presidential conflict of interest coupled with the congressional need for information on which to base both impeachment and future legislation to curb executive misrule suggest that the court should have enforced the congressional subpoena. I suspect that Professor Kurland agrees with this analysis and only wish that he had made it more specific.

As the author notes, the courts were substantially more inclined to override executive privilege when it threatened their own bastions of power. The first subpoenas issued by the federal grand jury investigating the Watergate affair went to the courts under the caption of *United States v. Nixon*.³⁵ Judge Sirica held that the privilege would be overridden to the extent of requiring the President to submit the subpoenaed information to the court for in-camera review. Material unrelated to the grand jury's investigation would be excised, but the grand jury would receive nonprivileged information.³⁶

On a writ of mandamus, the D.C. Circuit affirmed,³⁷ holding that there was a longstanding judicial executive privilege and an equally

34. P. KURLAND, *supra* note 1, at 57.

35. 360 F. Supp. 1 (D.D.C. 1973), *aff'd sub nom.* Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973).

36. *Id.* at 14.

37. 487 F.2d 700 (D.C. Cir. 1973).

longstanding judicial power to override it. Kurland is properly critical both of the case authority on which the court relied and of the failure to apply the same reasoning to the congressional subpoenas.³⁸ Examined from a functional perspective, however, the decision is entirely understandable. Especially in light of later events, one can readily appreciate that the President suffered an inherent and immense conflict of interest in determining whether national security or internal communications justified the exercise of the privilege. And if the situation had no precedent, it is perhaps because we have been fortunate to have generally honest men serving as President.³⁹

Kurland is on much firmer ground in his criticism of the failure of the court to apply its analysis to the congressional subpoenas, which it refused to enforce. The conflict of interest was as great with respect to the Senate Committee, and the elected representatives of the people had at least as much interest in the information as did a grand jury under the thumb of the prosecutor. Again, I would submit that a functional analysis provides a principled, consistent basis for judicial resolution of both situations. When a President whose survival in office is at stake seeks to use executive privilege as a shield—as did President Nixon during the Watergate affair—he should be disabled from exercising that power. It is entirely appropriate that the judiciary serve as neutral arbiter in this situation. This analysis produces a consistent result for both congressional and judicial subpoenas—one in which the subpoenas would have been enforced.

Chapter five deals with the President's power of appointment and removal, which was critical to the Watergate affair because of the status of the special prosecutor.⁴⁰ The legislation establishing Archibald Cox as special prosecutor asserted that he was removable only for extraordinary improprieties and thus purported to limit the President's power to discharge him. Nixon's attempt to do so, of course, precipitated what later became known as the "firestorm" and played a principal role in the decline of public confidence that ultimately drove him from office.

I find this essentially uninteresting, in part because it is unlikely to be

38. P. KURLAND, *supra* note 1, at 61.

39. It is significant that the cases most nearly analogous to the Watergate tape cases, *United States v. Burr*, 25 F. Cas. 187 (C.C. Va. 1807) (No. 14694), and *United States v. Burr*, 25 F. Cas. 30 (C.C. Va. 1807) (No. 14692), concerned the prosecution of the former Vice President, a bitter political enemy of President Jefferson. The possibility of a presidential conflict of interest was obvious.

40. P. KURLAND, *supra* note 1, at 75-103.

of practical importance in an impeachment or investigatory situation, and in part because the issues have been trampled beneath the weight of conflicting judicial opinions. As the “firestorm” demonstrated, when a President has reached the point where a special prosecutor is necessary to investigate charges against him, it is very unlikely that as a matter of political reality—as opposed to constitutional mandate—he can safely remove a special prosecutor. Moreover, the history of judicial expression on the appointment and removal power is hardly an inspiring one.

In part, as Kurland notes, this is because the constitutional history of the removal power is very unclear.⁴¹ There is reasonable evidence in *The Federalist No. 77* that indicates the Senate, as a participant in the appointment through the advise and consent power, can also exercise veto power over presidential removal of officers.⁴² But the issue has become sufficiently blurred by some other writings,⁴³ especially in the early days of the Republic, that it is by no means clear.

Professor Kurland notes that three major themes have run through the courts’ attempts to deal with presidential removal powers.⁴⁴ The first is unavowedly congressional, at least insofar as officers whose appointment requires the advice and consent of the Senate. Removal power follows from the appointive power. The second thesis argues that removal is inherently an executive power and thus limitable only by constitutional provision. The third theme focuses on the specific legislation creating the office. If Congress is permitted to create the office, it also has the power to specify the terms and conditions on which its occupant can be removed.

The courts have done very little to clarify which of these themes is to apply under which circumstances. In the first significant removal case, *Myers v. United States*,⁴⁵ the Court held that removal was exclusively a presidential option. Chief Justice Taft relied upon the notion of inher-

41. *Id.* at 78-79.

42. *Id.* (quoting THE FEDERALIST NO. 77 (Wright ed. 1961)): “It has been mentioned as one of the advantages to be expected from the cooperation of the Senate, in the business of appointments, that it would contribute to the stability of the administration. The consent of that body would be necessary to displace as well as to appoint.”

43. *Id.* at 80. See 1 ANNALS OF CONGRESS 516’ (J. Gales ed. 1789).

44. P. KURLAND, *supra* note 1, at 85.

45. 272 U.S. 52 (1926).

ent presidential power to appoint, which consequently gave him the exclusive power to remove an officer. Holmes⁴⁶ and Brandeis⁴⁷ dissented, essentially on the ground that Congress had created the office in question—a small town postmaster—and therefore could state the conditions for removal.

The President's inherent power to remove, however, went the way of the buffalo in *Humphrey's Executor v. United States*,⁴⁸ in which, as Kurland puts it, "Myers was distinguished to death."⁴⁹ The key question in *Humphrey's Executor* was whether Humphrey had occupied a "purely executive" office. As to such offices, the President has complete discretion to terminate appointments. With respect to other offices, however, the presumption is otherwise: Unless the legislature specifically grants exclusive power to the President, he lacks the authority to terminate an officer.

The functional analysis employed in *Humphrey's Executor* is a much better way to resolve the issue than the sledgehammer presidential powers approach of *Myers*. At least for offices created and funded by Congress, it seems only reasonable that Congress can specify terms, duties, and other obligations of the office in the enacting legislation, except when the Constitution specifically directs otherwise. The courts have lived with such a limitation since 1787: Since Congress has the power to create lower federal courts, it also has the power to limit their jurisdiction.⁵⁰ I would reverse the presumption only with respect to offices that are essential to the conduct of the Presidency per se—that is, the counsel to the President, other members of the White House staff, and others in similar privity with the President

The most enjoyable part of this chapter is Kurland's trenchant criticism of the reasoning process in *Myers* and, indeed, in many of the Supreme Court's constitutional opinions:

What the Myers' opinions—majority and dissenting—reveal is that political questions will be decided in the courts by political judgments. I do not mean party allegiance when I speak of political judgments. Rather, the questions were answered the way writers of constitutions would answer them. Is it better to afford this power to the executive than to preserve it for congressional control? The issue was not how the Founders answered

46. *Id.* at 177 (Holmes, J., dissenting).

47. *Id.* at 240 (Brandeis, J., dissenting).

48. 295 U.S. 602 (1935).

49. P. KURLAND, *supra* note 1, at 95.

50. *See Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1869).

or would have answered the question; the issue was which alternative the judicial body would say is the better policy. Moreover, it is not what would have been better policy at the time of the founding of the nation, but what was better policy for the issues and conditions at the time of decision.⁵¹

My only criticism of this remark is that it understates a principal thesis of the founding fathers. Obviously, if the constitutional language or history offers a reasonable, clear answer, it should be dispositive. When the constitutional language or history is silent or ambiguous, as in the removal power, a functional analysis best captures the founding fathers' approach. They were essentially pragmatists, concerned with how the government *should* work. To preserve the spirit of the Constitution in the twentieth century, the adjudication of constitutional questions should inquire how the branches will function together, given men of average intelligence, integrity, and good will, and which of the various possible resolutions of the issue will best preserve the constitutional separation of powers. Given the pragmatism of the founding fathers, I strongly suspect that this kind of functional analysis will accord with the available constitutional history.

Chapter six addresses the nature of impeachment, the standard required for a legal impeachment, and the issue of its judicial reviewability. I find these subjects uninteresting primarily because they are dead issues. Concededly, a President who is about to be removed from office will have supporters who contend, as Nixon's did, that "high crimes and misdemeanors"⁵² means indictable crimes. But the evidence Kurland adduces, and for that matter the nature of the impeachment tool itself, has settled the question.⁵³ Impeachment is a means for removing officers who abuse their trust. As a tool for removing those who abuse their power, it is clear that there is no purpose whatever in requiring an indictable crime.

I am equally in accord with Professor Kurland that judicial review of impeachment proceedings was neither contemplated by the founding fathers nor at all desirable.⁵⁴ For removal is essentially a political tool to rid the Nation of one who has served it poorly; it is a political question in every sense of that oft-abused term. Even in the reapportionment cases, the Court recognized the political question doctrine as one

51. P. KURLAND, *supra* note 1, at 94.

52. *Id.* at 506 (citing U.S. CONST. art. II, § 4).

53. *Id.* at 106-16.

54. *Id.* at 130.

of separation of powers, one that disables the judiciary from acting. Despite Kurland's fears,⁵⁵ I find it inconceivable that the Supreme Court could fail to recognize that removal of a President from office for abuse of power is a question far better left to the ballot box than to resolution on legal principles. It is not, in the end, a legal question but a political one: Has the President abused his trust? Not only is that function expressly assigned elsewhere in the Constitution, but it is a question that hardly lends itself to the application of definable judicial standards.

Kurland next discusses presidential prosecutions and presidential pardons. He is squarely opposed to the indictment of a sitting President.⁵⁶ First, there is a complete lack of evidence that the founding fathers ever contemplated such a prospect. More importantly, it runs counter to their pragmatic natures to assume that the Constitution could submit the head of the Government to the indignity of a criminal trial. As Kurland notes:

The President is, by reason of the fact that the executive power of the United States is vested in him, a unique official. He is the only officer of the United States whose duties under the Constitution are entirely his responsibility and his responsibility alone. He is the sole indispensable man in government, and his duties are of such a nature that he should not be called from them at the instance of any other government or branch of government.⁵⁷

This conclusion is reinforced by the availability of an impeachment procedure for removal from office, after which indictment and trial is plainly available. While the Supreme Court has never resolved the issue, even an activist Court would have great difficulty in overcoming these considerations with the doubtful advantage of advancing by a few months the indictment of a criminal President.

The nature of presidential pardons arose in the Watergate context because of the Nixon pardon before indictment or trial. Professor Kurland's primary challenge to the legality of the pardon was that it occurred before arraignment, indictment, or conviction. He makes a reasonable case that the pardon might have been illegal.⁵⁸

Pardons are like the quality of mercy, falling on the just and unjust alike. For pardons of ex-Presidents for crimes committed in office, it is

55. *Id.* at 133-35.

56. *Id.* at 135.

57. *Id.*

58. *Id.* at 143-44.

absolutely essential that his successor have the power immediately to pardon even a Nixon. Impeachment of a sitting President at any time is a cataclysmic event. The greatest need after such a storm is to restore the ship of state to calm waters. I cannot conceive that indictment and trial of an elected but deposed President, who, however great his misdeeds, will continue to have millions of devoted supporters, could at all advance that goal. Quite the contrary, criminal trial following impeachment trial serves no purpose other than revenge upon a fallen leader. If the prospect of losing the Presidency does not deter future Presidents from offense, I think it highly unlikely that a jail term will. Nor is the deposed President likely to be in much danger of reassuming his office; impeachment tends to have a rather destructive effect on political careers. Accordingly, I am highly suspicious of any arguments that a premature blanket pardon of a deposed President for crimes committed in office could be anything but constitutional.

The last two chapters will be treated in reverse order. Chapter ten discusses the theory of the plebiscitary Presidency espoused and brought to its ultimate form by Richard Nixon. The theory of a plebiscitary Presidency is essentially that, once safely ensconced in office with a large majority, the President may dispense with separation of powers and all forms of presidential accountability.

These constitutional devices are viewed as inefficient and as tending to block or at least greatly hinder the will of the majority, which has selected the President. Further, the mandate of the people grants to the President the leadership of the Nation, a leadership entrusted to him by the magic of the ballot box against which none can stand.⁵⁹

The corollary to this concept of complete absence of accountability is that "when the President does it, that means that it is not illegal."⁶⁰ In short, once in office, "*l'état c'est moi*," at least until the President's term expires. It need hardly be added that such a concept of the Presidency is wholly at odds with the Constitution, a point the author makes via the steel seizure case⁶¹ and at greater length than necessary.⁶²

But Kurland also warns that, though Nixon was the foremost practitioner of the theory of the plebiscitary Presidency, he was not the innovator of its technique. Roosevelt's court-packing plan, the consistent refusal of Presidents to release information to Congress, the impound-

59. *Id.* at 152.

60. *Id.* at 222.

61. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

62. P. KURLAND, *supra* note 1, at 205-10.

ment of funds, and above all the concentration of power within the White House and its executive staff were all devices employed long before the Nixon administration to expand the power of the Presidency in particular battles.⁶³

The difference, of course, is that Nixon's contribution, if one wants to call it that, was to combine and coordinate these past efforts and to use them persistently until they came to replace the democratic institutions that other Presidents accepted. Kurland correctly identifies the central factor in this process as the growth of the White House staff and the development of the White House Office.⁶⁴

Chapter nine examines some of the Watergate-inspired reforms that purport to limit presidential power. The only substantial reform enacted into law was the limitation on presidential campaign spending, which Kurland regards as a weak palliative for the real evils that affect the Presidency.⁶⁵ Kurland is far more concerned with the development of the concept of a "political police," which Nixon came close to acquiring with his abuse of the Internal Revenue Service, his development of the White House "plumbers," and perhaps his use of the Central Intelligence Agency. He fears that the intelligence establishment may become the twentieth century version of the "standing army" so feared in *The Federalist Papers*.⁶⁶ There has been essentially no reform to prevent this possibility. Accordingly, he suggests the development of an office of congressional legal counsel charged with the duty to investigate and prosecute misbehavior of executive, judicial, and legislative officials, whether for their impeachment or for legislation to cure the evils discovered.⁶⁷ This new office would oversee the executive branch and would have the power to make investigations and issue subpoenas upon its own motion.

I agree with Professor Kurland that little has been done to develop institutional checks to lessen the likelihood of future Watergates, and that control of the intelligence establishment by some publicly elected official is essential. I do not believe, however, that this is the central problem of presidential abuse of power. For the intelligence establishment is merely a tool—albeit a tool too readily available to one tempted to abuse it. The central problem is that of controlling the Pres-

63. *Id.* at 211 *passim*.

64. *Id.* at 177-79.

65. *Id.* at 183-84.

66. *Id.* at 193-95.

67. *Id.* at 195-97.

ident directly and not merely controlling the multifarious tools available to a corrupt President to chastize his enemies.

Unfortunately, there are few prospects for immediately effective reform to curb presidential power. The most obvious institutional steps are those designed to increase the information available to the public and particularly to opinion leaders such as the news media. The Freedom of Information Act⁶⁸ is one small step in this direction. But the social and historical trends that have elevated the Presidency to its pre-eminent place are unlikely to be easily reversed. The fact of power in the Presidency is *fait accompli*. And I know of no way to control that power other than by ensuring that the public, or at least the relevant segments of it, know what the President is doing on all matters of national importance and why. Presidents will obviously resist this because it reduces their power. But institutional mechanisms to open up the discussions of government on a regular basis seem to me the most promising kind of reform.

In the long run, what is required is a redefinition of the office itself. We expect the President simultaneously to solve all manner of problems—from inflation to energy, from foreign policy to public works. And if he does not, we are likely to punish him at the polls. We must recognize that the President is only one man, working with often imperfect knowledge and limited tools to resolve inherently conflicting problems. When and if the American people recognize that any President is severely limited in his ability to resolve these conflicting priorities and regard the Presidency as something less than the answer to all of our social problems, presidential power will diminish. Much of the fear of another Watergate will then also diminish.

It was said of the German people during the Nazi era that they deserved the government they got. In a larger and less pejorative sense, the same may be true of the American people today. Professor Kurland is absolutely right in concluding that some institutional changes are necessary to avert some of the excesses of the Nixon years. But more fundamental change is required to address the central problems—a change in the attitude of the people toward the nature of the office of the Presidency.

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68. 5 U.S.C. § 552 (1976).

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